

**ST 99-22**

**Tax Type: Sales Tax**

**Issue: Books and Records Insufficient  
Disallowed General Deductions  
Bearing the Burden for Payment of Tax (Claim Issues)  
Unreported/Underreported Receipts (Non-Fraudulent)**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No.	97-ST-0000
<b>OF THE STATE OF ILLINOIS</b>	)	IBT No.	0000-0000
	)	NTL Nos.	SF-1900000000000000
v.	)		SF-1900000000000001
	)		SF-1900000000000002
<b>“GASOLINE EXPRESS”,</b>	)	John E. White,	
Taxpayer.	)	Administrative Law Judge	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** William Marutzky appeared for “Gasoline Express, Inc.”; John Alshuler appeared for the Illinois Department of Revenue.

**Synopsis:**

This matter involves a timely protest by “Gasoline Express” (“GE” or “Taxpayer”) to three Notices of Tax Liability (“NTLs”) issued against it by the Illinois Department of Revenue (“Department”). NTL number SF-1900000000000000 assessed Retailers’ Occupation Tax (“ROT”) regarding the period from 7/1/93 through and including 11/30/93, NTL SF-1900000000000001 assessed ROT regarding the period beginning 12/1/93 through and including 12/31/93, and NTL SF-1900000000000002 assessed ROT regarding the period beginning 1/1/94 through and including 8/31/96.

The hearing was held at the Department’s offices in Chicago, in March 1999. At that hearing, taxpayer introduced evidence consisting of workpapers prepared by the Department auditor during the audit of taxpayer, workpapers prepared in anticipation for

hearing by “GE”’s accountant, and the testimony of that accountant. I have reviewed the evidence adduced at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend the NTLs be revised solely to take into account the amounts of county and municipal motor fuel taxes in effect during 1993.

**Findings of Fact:**

1. “GE” is a sole proprietorship (“John Doe” is the owner) that conducts business by making retail sales of gasoline and other products at two gas stations and mini-marts at two locations in Chicago, Illinois. *See* Taxpayer Ex. 1, pp. 6, 11. One location is at “1900 West 189<sup>th</sup> Street (roughly, 189<sup>th</sup> & Scarsdale)”, and the second location is on the corner of “Main & Elm” Avenues. *Id.* at 6.
2. The three NTLs issued were with regard to two separate audit periods. *See* Taxpayer Exs. 1-2. The first audit period began in January 1992 and ran through and including the end of December 1993, the second period began in January 1994 and ran through and including the end of December 1996. Taxpayer Ex 1, pp. 11, 26 (involving 1994 to 1996); Taxpayer Ex. 2, pp. 49, 78 (1992 to 1993).
3. By the time the audit was completed, the ROTA’s statute of limitations prevented the Department from assessing tax regarding receipts “GE” earned from 1/92 through 6/93. *See* Taxpayer Ex. 2, p. 27; 35 **ILCS** 120/4. Therefore, the NTLs issued assess tax regarding the months of 7/93 through 8/96. Department Exs. 1-3.
4. Two NTLs were issued regarding the last six months of 1993 (*see* Taxpayer Ex. 2, pp. 1-2 (NTLs), 27-29 (revised corrections of returns for 1993 period)) and were issued separately to take into account the Uniform Penalty and Interest Act (“UPIA”) (*see* Taxpayer Ex. 2, p. 62), which went into effect on January 1, 1994. 35 **ILCS** 735/3-1 *et seq.* (a December 1993 return was due not later than 1/20/94).

5. Since taxpayer tendered no books and records for inspection and audit, the Department's auditor was required to use her best information and judgment when auditing taxpayer's business and returns as filed. *See* Taxpayer Ex. 1, pp. 6, 49; Taxpayer Ex. 2, pp. 41-42, 49.
6. The auditor calculated "GE's" tax base by multiplying taxpayer's purchases for resale (as measured by the total number of gallons of gasoline "GE" purchased each month) by a given selling price per gallon of gasoline. Taxpayer Ex. 1, pp. 12-13, 26; Taxpayer Ex. 2, pp. 49-50, 78.
7. The auditor used prepaid sales tax reports taxpayer's suppliers filed with the Department to determine how much gasoline "GE" purchased for resale during the audit period. Taxpayer Ex. 1, p. 12; Taxpayer Ex. 2, p. 49. Those reports identified the number of gallons of gasoline each of the suppliers sold to taxpayer. Taxpayer Ex. 1, p. 26; Taxpayer Ex. 2, pp. 49, 78, 81-142. Taxpayer did not dispute the amount of gasoline it purchased during the audit period. Tr. pp. 22-23.
8. For 1994, 1995 and 1996, the auditor multiplied the number of gallons purchased by an average selling price of gasoline for each of those respective years. Taxpayer Ex. 1, pp. 12-13, 26. The auditor obtained those average yearly prices from the public affairs department of the AAA-Chicago Motor Club. *Id.*
9. For the 1993 audit period, the auditor attempted but was unable to obtain information regarding the average selling price of gasoline in the Chicago area from the AAA. Taxpayer Ex. 2, pp. 58-59. The best information available to the auditor was taxpayer's current (i.e., current when she was conducting the audit) selling prices for three different grades of gasoline. Taxpayer Ex. 2, pp. 49, 78.

10. The auditor compared her best estimate of “GE’s” total gross receipts to the receipts as reported on line 1 of taxpayer’s monthly ROT returns for the audit period, and treated the difference as unreported gross receipts. Taxpayer Ex. 1, pp. 12-13, 26-27; Taxpayer Ex. 2, pp. 49-51, 61, 76, 78.
11. The NTLs assessed tax as measured by those unreported receipts, after taking into account the amount of tax collected from those receipts. Taxpayer Ex. 1, pp. 13, 28, 34; Taxpayer Ex. 2, pp. 50-51, 77, 80.
12. The NTLs also assessed tax that was measured by the amount of deductions previously claimed as being not subject to ROT on taxpayer’s monthly returns, but for which the auditor could find no documentary support. Taxpayer Ex. 1, pp. 13, 28, 34; Taxpayer Ex. 2, pp. 50-51, 77, 80.
13. For both audit periods, the auditor prepared schedules to identify the amount and types of deductions to which she determined taxpayer was entitled. *See* Taxpayer Ex. 1, pp. 26, 33-34; Taxpayer Ex. 2, pp. 69, 71-72, 74-75, 77-78, 80. Those schedules allowed deductions for: the amount of motor fuel tax paid by taxpayer; the amount of tax “GE” collected from its customers; the amount of a 2% FDA tax “GE” collected during 1994-1996; and the amount exempt pursuant to taxpayer’s purchases and sales of gasohol during 1994-1996. Taxpayer Ex. 1, pp. 26, 34; Taxpayer Ex. 2, pp. 78, 80 (pages 26 & 78 show the amounts taken into account for “Tax Collected” regarding the unreported receipts, pages 34 & 80 show, respectively, “Motor Fuel, Gasohol and Tax Collected Deductions Verified Per Audit” and “Motor Fuel and Tax Collected Deduction Verified Per Audit”).
14. For the 1994-1996 period, the auditor determined that taxpayer should be allowed

a deduction for 30¢ for each gallon of gasoline shown to have been purchased by taxpayer. Taxpayer Ex. 1, pp. 13, 26, 34. That 30¢ figure equals the total of the state (19¢), county (6¢) and municipal (5¢) motor fuel or vehicle fuel tax assessed (*see* Taxpayer Ex. 1, p. 13) on, e.g., the privilege of operating motor vehicles on the public highways of Illinois and recreational vehicles on the waters of Illinois. 35 ILCS 505/2; Cook Co. Ord. § 13-110-1(a); Mun. Code of Chicago § 3-52.

15. For the 1993 period, the auditor determined that taxpayer should be allowed a 19¢ per gallon deduction, that is, a deduction equal to the amount of state motor fuel tax. Taxpayer Ex. 2, p. 80; *see also* 86 Ill. Admin. Code § 130.435(a)(1). The Cook County Motor Fuel Tax and the City of Chicago's Vehicle Fuel Tax, however, were also in effect during 1993, as they were in 1994 through 1996. Cook Co. Ord. § 13-110-1(a) (effective July 27, 1976); Mun. Code of Chicago § 3-52 (effective May 11, 1988).
16. The following table takes into account the entries made on the auditor's Schedule 4D for the 1993 audit period (*see* Taxpayer Ex. 2, p. 80), as well as the amounts of county and city motor fuel tax in effect in 1993, which amounts were taken into account by the same auditor and allowed as deductions regarding this same taxpayer for the subsequent audit period. Taxpayer Ex. 1, pp. 13, 26, 33-34.

Mo/Yr	Gallons of gasoline purchased	Schedule 4D amount for "Motor Fuel Tax Established Per Audit" using 19¢ per gallon	Schedule 4D amount for "Motor Fuel Tax Established Per Audit" after taking into account additional 11¢ / gallon	Schedule 4D amount for "Total Deductions Allowed Per Audit"	Schedule 4D amount for "Total Deductions Allowed Per Audit" after taking into account additional 11¢ / gallon	Schedule 4D amount for "Total Deductions Reported Per ST-1's"	Schedule 4D amount for "Additional Deductions Disallowed" after taking into account additional 11¢ / gallon
Jul-93	709,078	134,724.82	212,723.40	175,267.82	253,266.40	239,138.00	14,128.40

Aug-93	698,694	132,751.86	209,608.20	171,351.86	248,208.20	242,319.00	5,889.20
Sep-93	647,182	122,964.58	194,154.60	164,780.58	235,970.60	213,697.00	22,273.60
Oct-93	662,087	125,796.53	198,626.10	172,190.53	245,020.10	250,272.00	(5,251.90)
Nov-93	699,843	132,970.17	209,952.90	173,001.17	249,983.90	249,204.00	779.90
Dec-93	728,177	138,353.63	218,453.10	183,029.63	263,129.10	278,836.00	(15,706.90)
<b>1993 Schedule 4D "Additional Deductions Disallowed" Amounts After Taking Into Account the 11¢ per Gallon Local Motor Fuel Taxes Imposed</b>							<b>\$22,112.30</b>

*See* Taxpayer Ex. 2, p. 80.

17. The auditor determined the deductions allowed by her audit after taking into account the amounts of motor fuel taxes, FDA tax, and gasohol exemptions for each gallon of gasoline "GE" purchased. Those amounts were allowed to the extent they were claimed on the returns "GE" filed regarding the audit period. Taxpayer Ex. 1, pp. 33-34; Taxpayer Ex. 2, pp. 78-80.
18. The auditor disallowed all deductions "GE" reported on the returns as filed that exceeded the deductions she determined should be allowed. Taxpayer Ex. 1, pp. 29-30, 34; Taxpayer Ex. 2, pp. 71-75, 77, 80. She did not give taxpayer credit for any amounts of deductions not claimed on "GE's" returns, but which her audit indicated taxpayer might have been allowed had it reported all of its receipts and supported its deductions. *See* Taxpayer Ex. 1, pp. 29-30, 34; Taxpayer Ex. 2, pp. 71-75, 77, 80.
19. The auditor treated the amounts of "Additional Deductions Disallowed" as taxable gross receipts, and the NTLs assessed tax as measured by the amount of those disallowed deductions. Taxpayer Ex. 1, pp. 29-30, 34; Taxpayer Ex. 2, pp. 61, 77, 80.
20. Prior to hearing, and during the course of the proceedings within the Department's Office of Administrative Hearings, taxpayer's accountant, "Marple", met with the Department's auditor and tendered books and records to

- her. Tr. pp. 76-77; *see also* Order dated 1/9/97 (indicating that the Department had received books and records from taxpayer to review).
21. “Marple” claimed to have tendered to the Department’s auditor “GE’s bank statements, documents showing the amount of “GE’s lottery sales and documents showing average gasoline prices. Tr. pp. 24, 39 (bank statements), 29, 38 (lottery sales), 39-40 (gasoline price reports). None of the books and records “GE” tendered to the Department, however, were offered as evidence at hearing.
  22. When he was preparing the workpapers in anticipation of hearing, and which were offered as evidence, “Marple” testified that he used a 4½¢ to 6½¢ mark-up of gasoline “based on the history average and discuss[ions] ... with [taxpayer].” Tr. p. 35.
  23. None of the workpapers that were introduced as evidence show what “GE’s cost prices for gasoline were during the years in the audit period, or what specific mark-up rate was used by taxpayer during any given month in those audit periods. *See* Taxpayer Exs. 3-4.
  24. Taxpayer introduced no books and records at hearing to show that its selling prices for different grades of gasoline during the audit period ranged from 4½¢ to 6½¢ over its cost price of gasoline, and “Marple” acknowledged that no books and records substantiated that mark-up. Tr. p. 35.
  25. The auditor used a selling price of \$1.47 per gallon to estimate “GE’s gross receipts from selling tangible personal property during 1996 (Taxpayer Ex. 1, pp. 12-13, 35), even though “GE’s actual average selling price for the three grades of gasoline it sold in May of 1996 was \$1.60 per gallon. Taxpayer Ex. 2, pp. 59, 78

(on May 21, 1996, the auditor visited “GE’s business premises and completed her schedules for the first audit period using taxpayer’s actual average selling prices of gasoline).

26. After reviewing the schedules the auditor prepared regarding the audit periods, “Marple” concluded that the auditor had not given “GE” credit for the amounts of motor fuel tax. Tr. p. 30. “Marple” also concluded that the auditor used the last six months of 1993 as a test period, and projected a tax liability against “GE” based on her determinations regarding that test period. Tr. p. 18; *but see* Taxpayer Ex. 1, p. 26 (the auditor calculated total sales for each month in the second audit period, using a different selling price for each year).

**Conclusions of Law:**

Pursuant to a pre-hearing order, the parties agreed that the issues to be resolved at hearing included:

- a) Whether Taxpayer underreported gross receipts;
- b) Whether Taxpayer is entitled to deductions for prepaid motor fuel taxes;
- c) Whether Taxpayer is entitled to a deduction from gross receipts for taxes collected; and
- d) If the Department's decision to use Taxpayer's bank deposits as its taxable base is warranted, whether Taxpayer should be allowed to deduct lottery sales

Pre-Hearing Order. I will address the issues in turn.

**Issue 1:**

The Department introduced the Notices of Tax Liability into evidence under the certificate of the Director. Department Group Ex. No. 1, pp. 1-3. Those NTLs constitute *prima facie* proof of the correctness of the amount of tax due. 35 ILCS 120/4. The Department's *prima facie* case is a rebuttable presumption. Copilevitz v. Department of



Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer must present evidence that is consistent, probable and closely identified with its books and records, to show that the assessment is not correct. Filichio v. Department of Revenue, 15 Ill. 2d 327, 333 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34.

Some of the evidence "GE" introduced to rebut the Department's *prima facie* case included the Department auditor's own workpapers. Taxpayer Exs. 1-2. Among the facts those exhibits established was that the Department's auditor had to estimate taxpayer's gross sales because taxpayer failed to tender any books and records for inspection and audit. Those workpapers also show that, after being unable to receive information as to the average selling prices of gasoline during 1992 and 1993 from the Chicago Motor Club (Taxpayer Ex. 2, pp. 58-59), the auditor obtained and used the average of taxpayer's actual selling prices for gasoline at the time she was completing her audit. Taxpayer Ex. 2, pp. 59, 78. That actual average selling price was \$1.60 per gallon, and was derived by calculating the average price from a range of three prices taxpayer charged for the three different grades of gasoline it sold. Taxpayer Ex. 2, p. 78. The auditor used different selling prices for subsequent years in the audit period, and the auditor's corrected tax returns (and the NTLs) took into account those different selling prices. *E.g.*, Taxpayer Ex. 1, pp. 3, 12-13, 35.

Taxpayer also introduced the testimony and workpapers of its accountant, "David

Marple”. Tr. pp. 12-42; Taxpayer Exs. 3-4. “Marple” testified as both an opinion and as a fact witness, and was the only witness to appear at hearing. As an opinion witness, he testified that the Department’s auditor grossly overstated “GE’s tax liability for the audit periods. Tr. p. 14. That gross overstatement was made, “Marple” testified, because the auditor chose an average selling price of three different grades of gasoline, when most gasoline sold is the lowest grade, and because the price the auditor chose was much higher than the taxpayer’s selling price for gasoline. Tr. p. 28.

Neither “Marple” nor taxpayer, however, ever offered any facts or documents to substantiate “Marple’s conclusion as it pertained to “GE’s sales of gasoline. The reports the auditor reviewed, for example, did not break down the gasoline taxpayer purchased into different grades; for the 1993 period, they merely identify how many gallons were purchased. *See* Taxpayer Ex. 1, pp. 82-143. There is, in short, no factual basis to support “Marple’s implied conclusion that most of the gasoline “GE” sold was the least expensive grade.

More importantly, taxpayer never introduced any records whatever to show what it charged for the different grades of gasoline it sold during 1993. “Marple” testified that, when preparing his workpapers that were introduced at hearing, he used the number of gallons purchased from taxpayer’s suppliers, multiplied by taxpayer’s purchase price for the gasoline plus a mark-up. Tr. p. 26; Taxpayer Exs. 3-4. He obtained the number of gallons purchased from the auditor’s worksheets. Tr. p. 23. He obtained “GE’s cost price from taxpayer’s bank statements from the audit period. Tr. p. 34. “Marple” said he used a mark-up that was 4½ to 6½ cents per gallon over taxpayer’s cost price for the gasoline. Tr. p. 35.

None of the workpapers “Marple” prepared, however, detail any of the figures or calculations “Marple” described. *See* Taxpayer Exs. 3-4. That is, no document shows, for example, what “GE”’s cost price for gasoline was during the last six months of 1993, or what specific mark-up “GE” actually used when selling gasoline during any of the audit period. Did “Marple” use a mark-up of 4½ cents for the last six months of 1993; 5 cents; 6; a different mark-up for each month in that first audit period? The answers cannot be found in “Marple”’s workpapers.

Taxpayers are required to keep and maintain, *inter alia*, a written record of daily gross receipts from selling tangible personal property at retail. 86 Ill. Admin Code § 130.805(a)(1); Mel-Park Drugs v. Department of Revenue, 218 Ill. App. 3d 203, 214, 218-19 (1<sup>st</sup> Dist. 1991) (monthly summaries of total receipts are, as a matter of law, insufficient to rebut the Department’s *prima facie* case). On the six-month return “Marple” prepared (*see* Taxpayer Ex. 4), he testified that he used a mark-up that was based on his own knowledge of the market, and after discussing the matter with “GE”’s owner. Tr. p. 26. He also admitted, however, that no documents substantiated the mark-up he used. Tr. p. 35.

Thus, and instead of supporting its claim that the Department’s determination of tax due was incorrect with regularly maintained books and records, at hearing, “GE” offered “proof” in the form of its accountant’s testimony (and work product) based, in large part, on what “Marple” believed one of his ten gas-station clients may have charged for gasoline more than six years ago. Tr. p. 26 (“Marple” has about ten gasoline retailers as clients). Mere professional surmise, however, does not rebut the Department’s *prima facie* case. *See* Mel-Park Drugs v. Department of Revenue, 218 Ill. App. 3d at 218-19.

“Marple’s claimed personal knowledge of taxpayer’s current mark-up policy or procedure (*see* Tr. p. 26), moreover, does not mean that he thereby possessed personal knowledge of “GE’s selling prices during 1993. “GE” was not “Marple’s client then, or during most of the period audited. Tr. pp. 13-14 (“Marple” was hired as “GE’s accountant at the end of the second audit period); Taxpayer Ex. 1, p. 11; Taxpayer Ex. 2, p. 48 (other person named as being “GE’s accountant for both audits). Like the Department’s auditor, “Marple” could only guess what “GE” might have charged for gasoline in 1993.

“Marple” also testified that, prior to the hearing, he produced to the auditor a document regarding 1993 that was similar to the information the Department’s auditor obtained from the AAA. Tr. pp. 39-40. The record shows that the auditor used information from the AAA as the basis for her estimate of “GE’s selling price for gasoline during the 1994 through 1996 years. Taxpayer Ex. 1, pp. 12-13, 26. The document “Marple” claimed to have tendered to the auditor, however, was not made part of his workpapers (*see* Taxpayer Exs. 3-4), and no such document was ever offered as an exhibit at hearing. Therefore, I don’t know what statements may have been contained in that document. Nor is there any competent or credible evidence that whatever statements might have been disclosed in such a report would have better reflected “GE’s actual selling prices for gasoline during the last six months of 1993.<sup>1</sup>

I conclude that taxpayer has not rebutted the *prima facie* correctness of the Department’s determination that it underreported taxable gross receipts. It’s possible that

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<sup>1</sup> In fact, the only comparison of average-to-actual prices available in this record shows that, in 1996, “GE”’s actual selling prices for gasoline were greater than the average selling prices for gasoline (as one might rationally expect from a seller of premium or name brand gasoline). *Compare* Taxpayer Ex. 1, pp. 12-13, 35 *with* Taxpayer Ex. 2, pp. 59, 78.

“GE” sold gasoline for less than \$1.60 per gallon during the last six months of 1993, as “Marple” opined at hearing. But it was incumbent upon “GE” to introduce documentary evidence at hearing, or testimony that was clear, credible and identified with its regularly kept books and records, to show that the best information available to the auditor was inaccurate or unreasonable. See Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Fillichio v. Department of Revenue, 15 Ill. 2d 327 (1958). Here, taxpayer made no records available to the Department during audit. While the record establishes that “GE” subsequently produced records for the Department’s review, those records did not induce the Department to change its correction of taxpayer’s previously filed returns. And since “GE” introduced no regularly kept books and records at hearing, neither its accountant’s testimony nor his workpapers were supported by or identified with such documentary evidence. Taxpayer, therefore, has not rebutted the Department’s *prima facie* case.

As a final note, “Marple” referred to the Department’s use of a selling price of \$1.60 per gallon as being “grossly unfair” to taxpayer. Tr. p. 28. As I’ve already indicated, “GE” introduced no books and records to establish what its actual selling prices of gasoline were during that period, and its accountant prepared his workpapers using a mark up for which he had absolutely no documentary evidence to support. In other words, while taxpayer argues gross unfairness, it can cite to no documented facts to support that argument. On the other side of the “fairness” coin, however, the record in this case shows that the auditor knew, during 1996, that “GE’s actual average selling price for the three grades of gasoline was \$1.60 per gallon, yet she nevertheless estimated “GE’s total gross receipts using a selling price of \$1.47 per gallon. Compare Taxpayer

Ex. 1, pp. 12-13, 35 *with* Taxpayer Ex. 2, pp. 59, 78. In sum, any possible (and wholly unproven) error the auditor might have made on the front end of the audit appears to have been mitigated by her documented error, in taxpayer's favor (and regarding which the Department did not seek to correct at hearing), on the back end of the audit.

**Issues 2 & 3:**

I will address these two issues together. Taxpayer asserts (*see* Pre-Hearing Order) , and its accountant testified (*see* Tr. p. 30) that the auditor failed to give it credit for allowable deductions for prepaid motor fuel taxes and for taxes collected. As to the 1994 through 1996 audit period, taxpayer's argument and its accountant's conclusion are just plain wrong. The auditor's workpapers, which taxpayer itself offered as exhibits at hearing, clearly show that tax collected was taken into account by the auditor. Taxpayer Ex. 1, p. 26 (Schedule 3A). She similarly took into account the amounts of state, county and city motor fuel tax when calculating the deductions for which "GE" would be given credit and the deductions "GE" claimed that would be disallowed. Taxpayer Ex. 1, p. 28 (tax base attributable to disallowed deductions), 29-30 (global taxable exceptions taking into account the amounts of "Additional Deductions Overreported & Disallowed" as entered on Schedule 4D), 34 (Schedule 4D).

For the 1993 audit period, the schedules in the record show that the auditor also took into account the tax collected on the unreported receipts, and the amounts of state motor fuel tax on the total gallons of gasoline "GE" purchased for resale. Taxpayer Ex. 2, pp. 71-72, 74-75 (global taxable exceptions taking into account the amounts of "Additional Deductions Disallowed" as entered on Schedule 4D), 77 (tax base attributable to disallowed deductions), 78 (tax collected taken into account of Schedule

3A), 80 (Schedule 4D). The only error in the schedules prepared regarding the 1993 audit was that the auditor did not take into account the amounts of county and city motor fuel tax regarding the gasoline “GE” purchased for resale. Taxpayer Ex. 2, p. 80. Those amounts were taken into account and allowed during the subsequent audit period (*see* Taxpayer Ex. p. 34), and those taxes were in effect during 1993. Cook Co. Ord. § 13-110-1(a); Mun. Code of Chicago § 3-52. Since it is inconsistent for the Department to take opposite audit positions regarding the deductibility of identical taxes in a single hearing involving two consecutive audit periods, where the underlying applicable law remained the same through both periods, the errors made in the 1993 audit must be corrected.

Therefore, I recommend that, for the NTLs issued regarding 1993, the auditor’s Schedule 4D and other pertinent schedules be revised to take into account the amounts of Cook County and City of Chicago motor fuel taxes in effect during that time. *See* Taxpayer Ex. 2, pp. 40-41 (correction of returns), 61 (Schedule 1), 80 (Schedule 4D); Cook Co. Ord. § 13-110-1(a); Municipal Code of Chicago § 3-52. After those changes, the taxable base attributable to “Additional Deductions Disallowed” should be –\$22,112. *See* Taxpayer Ex. 2, pp. 77, 80; *see also, supra*, p. 5 (entries in last column<sup>2</sup> of table included within finding of fact number 16)  $(14,128.40 + 5,889.20 + (-5,251.90) + 779.90 + (-15,706.90) \approx \$22,112)$ .

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<sup>2</sup> For both audit periods, the numbers in the final column of the auditor’s Schedule 4D make up the tax base for disallowed deductions. *See* Taxpayer Ex. 1, pp. 28 (taxable base from disallowed deductions), 29 (global taxable exceptions for overreported deductions), 34 (Schedule 4D); Taxpayer Ex. 2, pp. 71-72 (global taxable exceptions for overreported deductions), 77 (taxable base from disallowed deductions), 80 (Schedule 4D). After taking into account the recommended revisions to the auditor’s Schedule 4D for 1993 in this matter, there would be no Additional Deductions Disallowed for 1993. *See* Taxpayer Ex. 2, pp. 77, 80. The tax liability, thereby, would be reduced for 1993.

**Issue 4:**

The Department, the record discloses (*see* Taxpayer Exs. 1-2, *passim*), did not decide to use “GE’s bank deposits as the tax base in this matter. The gross taxable receipts in this matter were calculated by a formula that considered the amount of gasoline taxpayer purchased, taxpayer’s estimated selling prices for that gasoline during each year in the audit periods, and after taking into account deductions allowable against *those* sales. Taxpayer Ex. 1, pp. 12-13, 26; Taxpayer Ex. 2, pp. 49-50, 78. Since the Department did not measure any ROT by any receipts taxpayer might have received from selling lottery tickets, taxpayer cannot seek to deduct lottery sales from the receipts by which tax *was* measured.

**Conclusion:**

I recommend that NTL Nos. SF-1900000000000000 and SF-1900000000000001 be finalized as revised. I recommend that NTL No. SF-1900000000000002 be finalized as issued. Interest on both assessments should accrue pursuant to statute.

9/16/99

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Administrative Law Judge